FILED
MAY 2 1991
OFFICE OF THE CLERK

(2)

No. 90-1524

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

ALLEN H. SMITH, *Petitioner,*
v.
MARY JANE SMITH, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a trial court order in a divorce action for equitable distribution which is merely advisory on evidentiary matters that may arise at a later fact finding hearing, but which does not specifically exclude any evidence, prohibit any person from testifying, or dispose of any property, is a final judgment or decree subject to review by this Court.

2. Whether a divorce litigant may be barred from introducing self-serving evidence in an equitable distribution proceeding if he refuses to disclose marital assets based on the fifth amendment self-incrimination privilege.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iii

Opinion and Orders Below 2

Jurisdiction 2

Statute Involved 2

Statement of the Case 2

Summary of Argument 3

Reasons Why The Petition Should Be Denied 4

A. This Court lacks jurisdiction because the order appealed from is not a final judgment or decree 4

B. The Pennsylvania Court has not decided a federal question in a way which conflicts with an applicable decision of this Court 5

C. The Pennsylvania Court has not decided a federal question in a way that conflicts with the decisions of other states or the U.S. Court of Appeals 6

Conclusion 7

TABLE OF AUTHORITIES

Page

STATUES AND RULES:

Pa. R.C.P. 1920.55 5

28 U.S.C. §1257(a) 4

CASES:

Baxter v. Palmigiano, 425 U.S. 308 (1979) 5

Kramer v. Levitt, 79 Md. App. 575, 558 A.2d 760 (1989) 6

Local No. 438 Construction & General Laborers' Union v. Curry, 371 U.S. 542 (1963) 4

Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69 (1946) 4

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Respondent respectfully requests this Court to deny Petitioner's request for a writ of certiorari seeking review of the Order of the Supreme Court of Pennsylvania dated December 13, 1990. The Order in question denied a Petition for Allowance of Appeal from a decision of the Superior Court of Pennsylvania. The Superior Court Order quashed an appeal from the trial court on the ground that the trial court Order was interlocutory.

OPINION AND ORDERS BELOW

The opinion and orders below are not published and are set forth in the Petition.

JURISDICTION

Petitioner cites 28 U.S.C. §1254(1), relative to cases in federal courts of appeals, as the statutory provision which confers jurisdiction. Contrary to Petitioner's assertion, Petitioner seeks review of a state court decision. Jurisdiction, if it exists, is conferred by 28 U.S.C. §1257(a). As set forth more fully below, Respondent disputes the jurisdictional basis of Petitioner's request for a writ of certiorari.

STATUTE INVOLVED

Title 28 U.S.C. §1257(a)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

Respondent Wife filed a divorce action against Petitioner Husband in 1980. On May 4, 1982, Wife served interrogatories on Husband as part of asset discovery in equitable distribution proceedings. The interrogatories requested Husband to provide financial information about Husband's law practice, investment properties, and other assets. After raising various objections to the discovery requests and pursuing numerous appeals,

Husband finally filed responses to the interrogatories in 1986 in which he claimed that disclosure of marital assets would tend to incriminate him in an Internal Revenue Service audit of his activities. Accordingly, Husband invoked the fifth amendment self-incrimination privilege and refused to disclose marital assets in response to the interrogatories.

The equitable distribution proceedings below remain in the discovery phase pending court appointment of a Master to hear evidence and recommend distribution of marital property. No hearing has taken place and no disposition of marital property has been decreed. The lower court Order *sub judice* was entered as a ruling on Wife's Motion for Sanctions on account of Husband's refusal to disclose marital assets. The lower court Order provides that sanctions, if any, "should be decided by the Master in light of all the circumstances and testimony at the Master's hearing." The lower court, therefore, did not impose any sanctions, bar any evidence, or dispose of any property. The Order only set forth "guidelines" and "principles" for the Master at a later hearing. The Order further recommended that the Master receive all evidence subject to a later motion to strike.

Husband filed an appeal from the lower court Order to the Superior Court of Pennsylvania. On Wife's Motion, the Superior Court appeal was quashed because the lower court Order was interlocutory. The Superior Court further granted Wife counsel fees for Petitioner's various prior appeals from interlocutory orders. Husband then petitioned the Supreme Court of Pennsylvania to allow an appeal from the Superior Court decision. The Supreme Court of Pennsylvania denied the petition per curiam. Husband now petitions this Court for certiorari.

SUMMARY OF ARGUMENT

The Petition should be denied because the trial court Order *sub judice* is not a final judgment or decree. No equitable distribution hearing has taken place and no disposition of

marital property has been decreed. No sanctions or evidentiary bars have been ordered. Petitioner's fifth amendment self-incrimination privilege has been recognized and upheld. The lower court has reserved ruling on sanctions, if any, until a full evidentiary record is developed. Accordingly, Petitioner is not irreparably injured since the issues raised herein are subject to further review in state court. In any event, the guidelines and principles set forth in the trial court Order are consistent with prior decisions of this Court and other state courts.

REASONS WHY THE PETITION SHOULD BE DENIED

A. THIS COURT LACKS JURISDICTION BECAUSE THE ORDER APPEALED FROM IS NOT A FINAL JUDGMENT OR DECREE.

Petitioner cannot bring the lower court Order before this Court for review because it is not a final judgment or decree. Only final judgments or decrees rendered by a state's highest court are subject to review. 28 U.S.C. §1257(a). A final judgment is one which effectively determines the litigation. *See Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 72 (1946). When the order is such that it might otherwise be deemed interlocutory, the Petitioner must show that there is a final assertion of jurisdiction with no further review of that issue possible in the state Court, the threat of serious diversion of national policies, and a state Court judgment on an issue anterior to and separable from the merits and not enmeshed in factual circumstances. *See Local No. 438 Construction & General Laborer's Union v. Curry*, 371 U.S. 542, 549-50 (1963).

In the instant case, the Order was entered following a pre-hearing conference between the trial judge and counsel. The order addressed evidentiary matters which *might* arise at a later Master's hearing on equitable distribution of marital property.

No testimony was stricken. No evidence was barred. No parties or witnesses were prohibited from testifying. Petitioner was not precluded from exercising his fifth amendment self-incrimination privilege. No irreparable injury has occurred because the Master's determinations and rulings, including evidentiary rulings, are subject to further review by the trial court. *See* Pa. R.C.P. 1920.55. The issue raised in this Petition has simply not been decided by the court below and is subject to further review in the state court proceedings. Any suggestion about what sanctions the Court may impose in the future, if any, is pure conjecture. Accordingly, the Petition lacks a jurisdictional basis.

B. THE PENNSYLVANIA COURT HAS NOT DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH AN APPLICABLE DECISION OF THIS COURT.

Even if the trial court's pre-hearing Order could be considered final, the contents of the order are consistent with applicable decisions of this Court. In *Baxter v. Palmigiano*, 425 U.S. 308 (1979), this Court held that "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them . . ." *Id.* at 318. Justice Brennan, in a dissenting opinion, agreed that an adverse inference may be drawn from the exercise of the self-incrimination privilege in civil suits. *Id.* at 335. The Court below held as follows: "To the extent that the husband has prevented the wife from obtaining information about the law practice either through refusal to answer interrogatories or otherwise, the Master is certainly entitled to draw an inference that information if provided would be adverse to the husband's interests." Accordingly, to the extent that this Court has ruled on the self-incrimination privilege in civil proceedings, the lower court's Order is not in conflict with decisions of this Court.

C. THE PENNSYLVANIA COURT HAS NOT DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISIONS OF OTHER STATES OR THE U.S. COURT OF APPEALS.

Petitioner sites *Kramer v. Levitt*, 79 Md. App. 575, 558 A.2d 760 (1989), for the proposition that a party who invokes his privilege against self-incrimination may not be prohibited from producing witnesses at trial. In *Kramer*, the trial court granted a motion *in limine* which prohibited appellant's father from testifying about an alleged exculpatory defense. The Maryland Special Court of Appeals affirmed the ruling because the appellant failed to answer interrogatories which requested the names of people with personal knowledge of any facts material to the case. The Court noted "[t]he trial judge is vested with a large measure of discretion in applying sanctions for failure to adhere to the discovery rules" and held that the lower Court "did not abuse that discretion in refusing to permit appellant's father to testify in appellant's defense." 558 A.2d at 767.

Unlike *Kramer*, Petitioner has not identified one witness which the lower Court prohibited from testifying. Petitioner has not identified one sentence of testimony which was stricken. Petitioner cannot identify the testimony or witness because no hearing has been held and no motion has been granted or denied. The lower Court merely established "guidelines" and "principles" for the Master at a later equitable distribution hearing. The Court thereby reserved its right to impose sanctions upon examination of the entire record and determination of whether the Wife was prejudiced by Husband's refusal to respond to discovery.

Moreover, the appellate court in *Kramer* based its ruling on the application of discovery sanctions. Any holding relative to the fifth amendment is dictum. Accordingly, even if the lower Court ruling can be considered a final judgment or decree, it has not decided a federal question in a manner

inconsistent with the Maryland Court. Petitioner cites no other state court decision or federal appellate court decision which conflicts with the lower court Order in this case.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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